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Lua & Mansor (suing as a firm) v Tan Ah Kim

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
C-02(NCVC)(A)-640-04 OF 2015
ROHANA YUSUF, IDRUS HARUN JICA AND MARY LIM J
1 DECEMBER 2016

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*Civil Procedure — Judgments and orders — Taxation order — Bill of costs
— Whether percentage of value of properties or payments were contingency fees
— Client filed petition to tax bill of costs after two and half years from delivery
— Whether taxation order made within time — Whether bill of costs premised
on agreed fees and should not be taxed — Whether taxation order ultra vires
s 117(3) and in contravention of ss 126 and 128 of the Legal Profession Act 1976*

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The respondent ('the defendant') appointed the appellant's ('the plaintiff') firm to represent her in claiming for ancillary reliefs stemming from a divorce proceeding. The defendant paid RM7,000 as fees to the plaintiff but refused to pay 15% of the value of the property or payments under relief ordered in addition to her fees. The plaintiff issue a detailed bill of costs but the defendant refused and argued that they were contingency fees. However, after a negotiation, the defendant made payments totalling to RM52,000 and filed a petition to tax the bill of costs at the High Court two and a half years after the delivery of the second bill of costs. The taxation was allowed. The plaintiff filed collateral proceedings at the High Court to set aside the taxation order. The collateral proceedings were dismissed by the judicial commissioner ('the JC') on the ground that, inter alia, the plaintiff had not appealed against the decision for taxation and had in fact actively participated in the taxation proceedings. Hence, the present appeal.

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Held, allowing the appeal with costs and setting aside the taxation order of the High Court:

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(1) There was a clear agreement between the plaintiff and the defendant on the fees vide the letter of appointment of the plaintiff by the defendant. Under s 117(3) of the Legal Profession Act 1976 ('the LPA'), the agreed costs made pursuant to s 116 of the LPA shall not be subjected to taxation. Therefore, the taxation order made on the agreed fees pursuant to s 116 of the LPA would be in contravention of s 117(3) of the LPA. The JC erred in allowing agreed costs under s 116 of the LPA to be taxed in the first place (see para 19).

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(2) Section 126 of the LPA sets out the time limit of six months from the delivery of a bill of costs ('BOC') for taxation. No order for taxation

should be made after expiration of that period except under special circumstances and this is set out under s 128(1) of the LPA. In any event, no taxation order shall be made after the expiry of one year as provided in s 128(2) of the LPA. The petition by the defendant on the second BOC was made two years, six months and nine days after the second BOC was delivered to her. It was never the defendant's case that the taxation order made by the JC, though out of stipulated time, could be justified on the ground of special circumstances. This was a case of a client who agreed to pay fees which were certain and then reneged on her own words after succeeding in her claim (see paras 21 & 25).

- (3) The participation of the plaintiff in the proceedings could not validate an invalid order. It was axiomatic that the plaintiff had to obey any order of a court no matter how defective or bad until it was set aside. This was premised on the underlying principle of duty of obedience and it was not for the plaintiff to decide for himself that any order of the court was wrongly issued. Failure to obey ran the risk of contempt (see para 26).

[Bahasa Malaysia summary]

Responden ('defendan') telah melantik firma perayu ('plaintif') untuk mewakilinya dalam menuntut relif-relif sampingan yang timbul daripada prosiding perceraian. Defendan telah membayar RM7,000 sebagai fi kepada plaintif tetapi enggan membayar 15% daripada nilai hartanah atau bayaran di bawah relif yang diperintahkan sebagai tambahan kepada finya. Plaintif telah mengeluarkan bil untuk kos tetapi defendan menolak dan berhujah bahawa ia merupakan fi kontingensi. Walau bagaimanapun, setelah berunding, defendan telah membuat bayaran berjumlah RM52,000 dan memfailkan petisyen untuk mengenakan cukai bil untuk kos itu di Mahkamah Tinggi dua setengah tahun selepas penyerahan bil untuk kos kedua. Pencukaian itu dibenarkan. Plaintif telah memfailkan prosiding kolateral di Mahkamah Tinggi untuk mengetepikan perintah pencukaian. Prosiding kolateral itu ditolak oleh pesuruhjaya kehakiman ('PK') atas alasan bahawa, antara lain, plaintif tidak merayu terhadap keputusan untuk pencukaian dan telahpun terlibat secara aktif dalam prosiding pencukaian itu. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos dan mengetapikan perintah pencukaian Mahkamah Tinggi:

- (1) Terdapat perjanjian jelas antara plaintif dan defendan berhubung fi melalui surat lantikan plaintif oleh defendan. Di bawah s 117(3) Akta Profesion Undang-Undang 1976 ('Akta tersebut'), kos yang dipersetujui yang dibuat menurut s 116 Akta tersebut tidak patut tertakluk kepada cukai. Oleh itu, perintah pencukaian yang dibuat berhubung fi yang dipersetujui menurut s 116 Akta tersebut adalah bertentangan dengan s 117(3) Akta tersebut. PK terkhilaf dalam membenarkan kos yang

- A dipersetujui di bawah s 116 Akta tersebut dikenakan cukai pada mulanya (lihat perenggan 19).
- (2) Seksyen 126 Akta tersebut menetapkan had masa enam bulan dari penyerahan bil untuk kos ('BUK') untuk dikenakan cukai. Tiada perintah untuk pencukaian patut dibuat selepas luput tempoh tersebut
- B kecuali dalam keadaan khas dan ini dinyatakan di bawah s 128(1) Akta tersebut. Dalam apa keadaan, tiada perintah pencukaian patut dibuat selepas luput satu tahun sepertimana diperuntukkan dalam s 128(2) Akta tersebut. Petisyen oleh defendan berhubung BUK kedua telah dibuat dua
- C tahun enam bulan dan sembilan hari selepas BUK kedua itu diserahkan kepadanya. Ia bukan kes defendan bahawa perintah pencukaian itu dibuat oleh PK, walaupun di luar masa yang ditetapkan, boleh dijustifikasikan atas alasan keadaan khas. Ini adalah kes anak guaman yang telah bersetuju untuk membayar fi yang telah dipastikan dan
- D kemudian dimungkirkan atas kata-katanya sendiri selepas berjaya dalam tuntutan (lihat perenggan 21 & 25).
- (3) Penglibatan plaintif dalam prosiding tidak boleh mengesahkan perintah yang tidak sah. Ia dapat disangkal bahawa plaintif perlu mematuhi apa-apa perintah mahkamah tidak kira bagaimana cacat atau tidak baik sehingga ia diketepikan. Ini berdasarkan prinsip kewajipan pematuhan yang asas dan ia bukan untuk plaintif memutuskan untuk dirinya sendiri bahawa apa-apa perintah mahkamah telah dikeluarkan secara salah. Kegagalan untuk mematuhi mempunyai risiko penghinaan (lihat perenggan 26).]
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Notes

For cases on judgments and orders in general, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5449–5890.

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Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad [1998] 1 MLJ 393, FC (refd)

H *Chai Chee Chin and Others v Tetuan Zahari Ong & Co* [2005] MLJU 623; [2006] 8 CLJ 84, HC (refd)

Phuah Choon Hwang & Anor v Hassan & Kong Yeam [1987] 1 MLJ 156 (refd)

Symbol Park Lane Ltd v Steggles Palmer (a firm) [1985] 2 All ER 167, CA (refd)

Tan Tek Sin & Anor v Tetuan Nora Hayati & Assoc (sued as a firm) [2015] 2 MLJ 1, CA (refd)

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Wee Choo Keong v MBf Holdings Sdn Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (refd)

Legislation referred to

Evidence Act 1950 s 44

Legal Profession Act 1976 ss 116, 117, 117(3), 126, 128, 128(1), (2), (3), Part IX

Solicitors Act 1974 [UK] s 70(3)

Appeal from: Originating Summons No 24NCVC-210–12 of 2014 (High Court, Temerloh)

Lua Kok Hiyong (Lua & Mansor) for the appellant.

Francis Tan (Rosni Francis Tan & Ho) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] In the High Court at Temerloh the appellant/plaintiff had applied to set aside a taxation order dated 14 July 2014 ('taxation order'). His application was dismissed. Dissatisfied with that decision he filed an appeal to this court. We had on 16 February 2016, allowed the appeal of the appellant and set aside the taxation order made by the learned trial judge. We set out below the reasons for our decision.

[2] We will refer to the parties as they were referred to, at the High Court.

[3] The impugned taxation order was made by the High Court relating to divorce proceedings of the defendant. In that divorce proceedings at the Temerloh High Court, the defendant's husband had petitioned for a divorce against her and a *decree nisi* dated 21 October 2009 was granted. The defendant however did not seek for any ancillary reliefs in that divorce proceedings.

[4] The defendant then by way of a letter dated 19 January 2010 (at pp 66–67 of *rekod rayuan Jld III*) appointed the plaintiff's firm to represent her to claim for ancillary reliefs against her ex-husband. The letter of appointment states the agreed fees in the following terms:

The following is the agreed fee exclusive of disbursement for filings, transportation etc:

- (i) application for leave: RM5,000.00
- (ii) application for ancillary relief proper i.e. for maintenance and sharing of assets — RM20,000.00. If the court granted order against my ex-husband for any ancillary relief, I agree to pay 15% of my portions of the value of the property or payments under relief ordered in additional to the above fee.

[5] The plaintiff succeeded in obtaining leave from the Temerloh High

- A Court to file for the ancillary reliefs, and proceeded to make claims for the defendant against her husband. The defendant's husband lodged an appeal against the said leave to the Court of Appeal but it was dismissed. Leave application was made to appeal to the Federal Court.
- B [6] Pending the hearing of the leave application, on 12 November 2010 both the defendant and her husband recorded consent judgment at Temerloh High Court on the ancillary reliefs. The consent order is as found at pp 69–71 *rekod rayuan Jld III*. By that consent order the defendant had obtained properties, car and cash estimated to be worth RM1.74m. This estimated value was an estimate made by the defendant herself. The consent order had already been effected and the defendant had already received all the assets, cash and car as per the consent order.
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- D [7] From the date of his appointment on 19 January 2010, up to the consent order obtained on 12 November 2010 the defendant had paid a total of RM7,000 as fees to the plaintiff. Out of this payment, RM2,000 was for disbursements and RM5,000 was for the agreed fees at leave stage.
- E [8] The defendant refused to pay the other part of the agreed fees and insisted for the plaintiff to issue a detailed bill of costs, which the plaintiff did. The bill of costs dated 30 December 2012 billed the defendant a sum of RM381,318.29 as costs inclusive of litigation fees at all levels, conveyancing fees for the transfer of two properties, as well as disbursements. The plaintiff
- F intimated to the defendant in the said bill that there was also an agreed success fees of RM261,000 premised upon 15% of the total value of the properties received by the defendant.
- G [9] The defendant refused to pay the bill of costs. Instead, she alleged that the fees charged by the plaintiff was a contingency fees and threatened to lodge a disciplinary complaint. A disciplinary complaint was indeed lodged by the defendant against the plaintiff pursuant to the Legal Profession Act 1976 ('the LPA'). The disciplinary committee, after investigating the complaint against the plaintiff, recommended for the complaint to be dismissed. Following that,
- H the disciplinary board dismissed the complaint against the plaintiff on 13 February 2015.
- I [10] The defendant having failed to pay the first bill of costs of RM381,318.29 then negotiated for a revision. The plaintiff reduced the amount to RM261,062.20 as shown in the second bill of costs dated 3 June 2011 (see pp 96–119 *rekod rayuan Jld III*). The first bill of costs was revoked as clearly stated in the letter by the plaintiff at pp 120–121 *rekod rayuan Jld III*.
- [11] The defendant made further payments which finally totalled to

RM52,000 as disbursements and part fees. On 12 July 2011, one month after delivery of the second bill of costs, the plaintiff filed a suit to recover the balance at the Temerloh Sessions Court. The defendant however did not attend court on the mention date and judgment in default was entered against her. The judgment in default was subsequently set aside by the Court of Appeal on 28 November 2013.

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[12] Meanwhile, on 26 August 2011 which was about six weeks after the plaintiff filed the sessions court suit, the defendant through Messrs Cheah Teh & Su filed a petition to tax the bill of costs at Kuala Lumpur High Court ('KLHC') vide Petition No 26NCVC-4-09 of 2011. The KLHC pointed out that the defendant had filed for taxation in the wrong court and that the right court would be the Appellate and Special Powers Division of the KLHC or the Temerloh High Court, where the divorce proceedings were conducted. The defendant then withdrew the petition at the KLHC with liberty to file it afresh.

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[13] The defendant filed another petition for taxation on 12 December 2013 at the Temerloh High Court. By this time, it was already over two and a half years from the time the second bill of costs was delivered to the defendant on 3 June 2011. The learned trial judge proceeded to allow taxation and granted an order for the bill to be taxed. The plaintiff did participate in the taxation proceedings.

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[14] The plaintiff filed an appeal against the taxation order but was one day late purportedly due to Hari Raya break. An extension of time applied by the plaintiff to lodge an appeal was dismissed.

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[15] The plaintiff then filed these collateral proceedings at the Temerloh High Court to set aside the taxation order vide Originating Summons No 24NCVC-210-12 of 2014. The application was grounded on the basis that: the taxation order made by the learned judicial commissioner ('JC') is ultra vires s 117(3) of the LPA by virtue of the fact that the bill of costs is premised on agreed fees and should not be taxed; that the taxation order is made out of time in contravention of s 126 as well as s 128(3) of the LPA; that the defendant had already paid part of the bill in a total sum of RM52,000 by several payments and had thereby admitted the bill as debt.

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[16] The collateral proceedings to set aside the taxation order was dismissed by the same learned JC. In his grounds of judgment the learned JC held that the plaintiff had not appealed against the decision for taxation dated 14 July 2014 and had in fact actively participated in the taxation proceedings; that the issues raised in the application were similar to the issues raised at taxation proceedings and res judicata applied because the court had no right to review its own

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A decision. The avenue opened to the plaintiff accordingly was to appeal against that taxation order.

B [17] Before us, the plaintiff had emphasised that the application made by the plaintiff are collateral proceedings to set aside the impugned taxation order. It was made in reliance on the principle of law as laid down by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Berhad* [1998] 1 MLJ 393, and s 44 of the Evidence Act 1950.

C [18] The principle of law enunciated in *Badiaddin* as we understand it, is that, where an order of the court is made in breach of statutes, or without jurisdiction, it may be declared void and may be set aside in proceedings brought for that purpose. Any order by the court that is made ultra vires or beyond the permitted limit under the statutes, obtained by fraud or abuse of court process, is a nullity ab initio.

E [19] The allegation of breach of statutory provisions by the plaintiff was anchored on the argument that the taxation order had been issued in contravention of the various provisions of the LPA. The part of the LPA which deals with recovery of legal costs and taxation of bill of costs is found in Part IX. We note that s 116 allows for an agreement between a solicitor and a client for costs in respect of a contentious business like in this case. There is a clear agreement made between the plaintiff and the defendant on the fees vide the letter of appointment of the plaintiff by the defendant. The defendant had never denied agreeing to the fees as stated in the letter appointing the plaintiff dated 19 January 2010 upon the terms that we have earlier alluded to in para 4 above. It is also amply clear that under s 117(3) the agreed costs made pursuant to s 116 of the LPA shall not be subjected to taxation. The taxation order made on the agreed fees pursuant to section 116 would, therefore, be in contravention of s 117(3) of the LPA. The learned JC had consequently erred in allowing an agreed costs under s 116 to be taxed in the first place. We agree with the learned plaintiff's counsel that on this ground alone, this appeal should be allowed.

H [20] It is also to be noted that the pre-agreed costs by the parties in this case is known as success fees, and not contingency fees because the agreed 15% fees is not contingent upon the defendant winning the case but it was additional fees agreed, in addition to the RM20,000 basic fees. This position taken by the plaintiff is in accord with the finding of the disciplinary committee under the LPA. The High Court in *Chai Chee Chin and Others v Tetuan Zahari Ong & Co* [2005] MLJU 623; [2006] 8 CLJ 84 had recognised such success fees.

I [21] It was also the case of the plaintiff that the impugned taxation order offended s 126 of the LPA as it was made outside the time limit stipulated in

that section. Section 126 sets out the time limit of six months from the delivery of a bill of costs, for taxation. No order for taxation should be made after expiration of that period except under special circumstances and this is set out under s 128(1) of the LPA. In any event, no taxation order shall be made after the expiry of one year as provided in s 128(2). The petition by the defendant on the second bill of costs was in fact made two years six months and nine days after the second bill of costs was delivered to her. This fact was not disputed by the defendant.

[22] For the respondent, the main thrust of the argument was that the avenue opened to the plaintiff was only by way of an appeal process, which the plaintiff had failed to do. The respondent contended that the court is not seized with an inherent jurisdiction to order taxation of a bill of costs outside one year of its delivery to the defendant. Learned counsel submitted that the learned JC had the inherent power to order taxation of a bill of costs even outside the time frame stipulated by the statute as in this case. In support of that proposition, learned counsel referred us to *Phuah Choon Hwang & Anor v Hassan & Kong Yeam* [1987] 1 MLJ 156. In that case the High Court had relied on the English case of *Symbol Park Lane Ltd v Steggle Palmer (a firm)* [1985] 2 All ER 167, which dealt with s 70(3) of the Solicitors Act 1974 of England. Under that section it is provided that if an application for taxation is made after 12 months, no taxation order shall be allowed. To be noted also that there is no express provision for an extension of time stipulated both in LPA as well as the Solicitors Act. In *Symbol Park Lane*, however the English court allowed taxation because of special circumstances. The High Court in *Phuah Choon Hwang* applied the principle as enunciated in the English case of *Symbol Park Lane* and found special circumstances present, to justify allowing a taxation order outside the time limit. In applying that principle the court in *Phuah Choon Hwang* had at the back of its mind the question of whether or not there was injustice which required the exercise of an inherent jurisdiction of the court.

[23] Learned counsel for the respondent further cited and relied on the decision of this court in *Tan Tek Sin & Anor v Tetuan Nora Hayati & Assoc (sued as a firm)* [2015] 2 MLJ 1 to contend that a bill of costs can be taxed even after one year. Not only that the bill was taxed even though one year had lapsed in that case, the court also had the authority to make an order for a more detailed bill of costs to be issued according to learned counsel.

[24] We have carefully examined the decision of this court in *Tan Tek Sin & Anor*. Central to the issue in dispute in that case was that the bill of costs was excessively exorbitant and disproportionate to the legal work expended by the solicitor. On its facts the court had also found that the engagement of the solicitor was for an uncomplicated court order. It was merely for a letter of administration in respect of an estate. Such application would entail the

- A preparation and filing of an originating summons together with supporting affidavits, and affidavits of consent by all the beneficiaries. There was no explanation by the solicitors on the exorbitant fees. Furthermore, the bill showed a lump sum of RM600,000 without itemising or particularising the legal work done. On these circumstances the court had found *prima facie*
- B special circumstances established, which demanded the invocation of its inherent jurisdiction. Having found that the bill was ‘astronomical to say the least and does not commensurate with work done’ the court was of the view that justice of the case required that such bill be taxed and such special
- C circumstances merit the invocation of its inherent jurisdiction. It was also for that same reason that the court had ordered for detailed bill of costs to be issued.

- [25] There was no such dispute in the present case on the amount of fees presented in the bill of costs since it was based on agreed costs. The bill of costs in this case was properly itemised and the case of *Tan Tek Sin & Anor* does not lend any support to the case of the defendant in urging this court to exercise any discretion in her favour. There were also no special circumstances shown or proven by the defendant. The defendant had in fact paid a total payment of
- D RM52,000 in several payments to support a case of a clear admission on the bill as debt due. It was never the defendant’s case that the taxation order made by the learned JC, though out of stipulated time, could be justified on the ground of special circumstances. There was in fact no evidence of special circumstances adduced before the trial judge. On the contrary, this is a case of a client who
- E agreed to pay fees which were certain and then reneged on her words after succeeding in her claim. Unlike *Tan Tek Sin & Anor*, there was no issue of an exorbitant bill or unconscionable bargain as raised and found in *Tan Tek Sin* to warrant judicial intervention. Even her attempt of a complaint to the disciplinary authority was not on the issue of an exorbitant bill. Far from
- F complaining, she had even paid part of the bill.
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- [26] The participation of the plaintiff in the proceedings cannot validate an invalid order. It is axiomatic that the plaintiff has to obey any order of a court no matter how defective or bad until it is so set aside. It has been a long established principle as decided by the Supreme Court case of *Wee Choo Keong v MBf Holdings Sdn Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210 that a person is duty-bound to obey a court order till it is set aside. This is premised on the underlying principle of duty of obedience and it is not for the plaintiff to decide for himself that any order of the court is
- H wrongly issued, because the failure to obey runs the risk of contempt.
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[27] Before we end we note that, learned counsel for the plaintiff had raised issues with the decision of the learned JC on his failure to make any finding or ruling in relation to s 44 of the Evidence Act 1950. Learned counsel contended

that his application to set aside the impugned taxation order was made by invoking the inherent jurisdiction of the court as well as s 44 of the Evidence Act 1950. A

[28] Section 44 deserves to be quoted in full to understand the full breath of its implication. It provides as follows: B

Any party to a suit to other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party was delivered by a court not competent to deliver it or was obtained by fraud or collusion. C

This section simply gives right to a party in a suit or proceedings to raise any of the following three grounds in relation to an order of a court:

- (a) that the order was delivered by a court not competent to deliver it; or D
- (b) that the order was obtained by fraud; or
- (c) that the order was obtained by collusion.

[29] The scope of s 44 above is to allow a party to a suit or other proceedings to avoid the effect of a judgment or any order of a court on any of the three grounds cited in that provision. It is a permissive provision that allows impeachment of judgment which is a nullity by proving either of the three grounds exists. This provision is contained in the part of the Evidence Act 1950 which deals with relevancy of judgment or order of a court. It is for the purpose of allowing a party in a proceedings to adduce evidence or to prove to the court that the judgment or order is obtained by wrongful or illegal way. It is neither a provision that provides a remedy nor does it confer on the court the authority or jurisdiction on how to deal with such impugned judgment or order. This is understandable because it deals with the right of a party to raise relevant evidence. The recourse opened to the plaintiff to set aside any wrongful order lies in the rule as enunciated by the Federal Court in *Badiadin*. Section 44 is supplemental to that rule and it deals with the right to adduce evidence for that purpose. E F G

[30] It is also settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But, *Badiadin* has allowed a special exception to this rule. It is where the final judgment of the High Court could be proved to be null and void on grounds of illegality or lack of jurisdiction which is the plaintiff's pleaded case herein. H I

[31] While it is true that there is no appeal filed against the taxation order, the learned JC was plainly wrong to have considered no appeal as a ground of dismissing the plaintiff's application. The law is trite and clear that if an order

A is bad in law the aggrieved party may apply to set aside the said order without appealing on the same.

[32] In conclusion and for all the above reasons stated, we agree with learned counsel for the plaintiff that this case warrants appellate intervention as the learned JC was plainly wrong in dismissing the collateral proceedings by the plaintiff premised on illegality of the taxation order. We agree that the impugned taxation order was made in excess of jurisdiction as it contravenes s 117 as well as s 128 of the LPA and ought to be set aside. In the circumstances, we allowed the appeal with costs and set aside the taxation order of the High Court.

Appeal allowed with costs; taxation order of High Court set aside.

Reported by Afiq Mohamad

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